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Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 85-1)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued August 16, 1984, to November 28, 1984, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was forwarded or issued.

(DRA-1-09)

Dated: December 24, 1984.

File: 217594.

EDWARD B. GABLE, JR.,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Advance Micro Devices, Inc.
Articles: Partially and fully fabricated semiconductor wafers; finished semiconductor devices
Merchandise: Raw silicon wafers
Factories: Sunnyvale, CA (2); Austin and San Antonio, TX
Statement signed: June 1, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), October 19, 1984
Revokes: T.D. 82-11-B

(B) Company: Ampacet Corporation
Articles: Plastic color concentrates in pellet form
Merchandise: Organic pigments
Factories: Mt. Vernon, NY; Terre Haute, IN; De Ridder, LA

Statement signed: July 21, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, September 26, 1984

(C) Company: Badische Corp.
Articles: Di-Octyl Phthalate (D.O.P.)
Merchandise: 2-ethylhexanol (2-EH) (Octyl Alcohol)
Factory: South Kearny, NJ
Statement signed: August 27, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), November 2, 1984
Revokes: T.D. 76-344-B

(D) Company: Borg-Warner Chemicals, Inc.
Articles: Plastic resin pellets
Merchandise: Plastic resin powders
Factories: Oxnard, CA; Ottawa, IL; Washington, WV
Statement signed: July 6, 1984
Basis of claim: Used in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, August 16, 1984
Revokes: T.D. 76-319-L and T.D. 79-63-D, to cover name change

(E) Company: Caltex, Inc.
Articles: Dyed nylon yarn for commercial carpeting
Merchandise: Single ply texturized nylon yarn
Factory: Calhoun, GA
Statement signed: September 17, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Miami, October 22, 1984

(F) Company: Celanese Chemical Company, Inc.
Articles: Methanol
Merchandise: See page 4, contract
Factories: Bay City, Houston, Pampa, and Bishop, TX; Newark, NJ; Cumberland, MD; Rock Hill, SC; Narrows, VA
Statement signed: September 19, 1984
Basis of claim: Used in; Appearing in, when valuable wastes exist
Rate forwarded to Regional Commissioners of Customs: New York and Houston, October 16, 1984

(G) Company: Celanese Chemical Co., Inc.
Articles: Acetaldehyde; Ethylene Oxide; Ethylene Glycol; Diethylene Glycol; Triethylene Glycol; Vinyl Acetate
Merchandise: Ethylene

Factories: Bay City, Bishop, Houston, Pampa, TX; Rock Hill, SC; Narrows, VA; Newark, NJ; Cumberland, MD
Statement signed: August 30, 1984
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: Houston, October 15, 1984

(H) Company: Ceres Corporation
Articles: Cubic zirconia crystals
Merchandise: Yttrium and zirconium oxides
Factories: Waltham and North Billerica, MA
Statement signed: October 23, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Boston, November, 8, 1984

(I) Company: Chevron Chemical Company
Articles: Orthene products
Merchandise: Acetic Anhydride and Dimethyl Sulfate
Factory: Richmond, CA
Statement signed: September 13, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), November 1, 1984

(J) Company: Dynamet Incorporated
Articles: Titanium and Titanium alloy wire and bar
Merchandise: Titanium and Titanium alloy in various forms
Factories: Washington, PA; Clearwater, FL
Statement signed: March, 12, 1984
Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: New York, September 26, 1984
Revokes: T.D. 82-120-B

(K) Company: Eastman Kodak Company
Articles: SAIB 100 and special grade and SAIB 90 and 90T
Merchandise: Hard refined powdered sugar
Factory: Kingsport, TN
Statement signed: October 26, 1984
Basis of claim: Used in for SAIB 100 and special grade; Appearing in for SAIB 90 and 90T
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), November 20, 1984

(L) Company: Eli Lilly and Company
Articles: Cephalexin monohydrate in bulk; finished product formulations of Keflex

Merchandise: p-nitrobenzyl ester of PVSO; phenylglycine derivative sodium salt; dimethyl formamide; triethylamine; methyl acetoacetate; cephalexin special; D-alpha phenylglycine levoratatory; semicarbazide hydrochloride; penicillin V potassium intermediate; P-nitrobenzyl bromide; cephalexin disolvate; phenoxyacetic acid; potassium acetate solution; potassium acetate tech; potassium bicarbonate; sodium chloroacetate tech; Isopropyl Alcohol; 7-ADCA PNB Ester; Methylchloroformate; Potassium Bicarbonate Powder; Potassium Carbonate; Tetrabutylammonium Bromide; Methylene Chloride Cyclohexane Stabilized; Pyridene 2 Degree
Factories: Lafayette, Clinton, and Indianapolis, IN
Statement signed: September 4, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, November 5, 1984
Revokes: T.D. 82-182-N

(M) Company: Eli Lilly and Company
Articles: Empty Hard Gelatin Capsules in bulk, various sizes
Merchandise: Gelatin, U.S.P.
Factory: Indianapolis, IN
Statement signed: August 15, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, September 27, 1984

(N) Company: Exxon Corporation, Exxon Chemical Co.—Exxon Chemical Americas Division
Articles: Oxygenated Solvents
Merchandise: Butylenes (Butene); Acetone (2-propanone)
Factories: Bayway, NJ; Baton Rouge, LA
Statement signed: September 14, 1984
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: Houston, September 26, 1984

(O) Company: Foot-Joy, Inc.
Articles: Shoes
Merchandise: Finished upper calf leather
Factory: Brockton, MA
Statement signed: August 24, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Boston, November 28, 1984

(P) Company: GenCorp Inc. (formerly the General Tire & Rubber Company)
Articles: Rubber tires

Merchandise: Steel Tire Cord
Factories: Barnesville, GA; Bryan, OH; Charlotte, NC; Mayfield, KY; Mount Vernon, IL; and Waco, TX
Statement signed: September 6, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Chicago, October 2, 1984
Revokes: T.D. 81–78–O

(Q) Company: General Defense Corporation
Articles: Ammunition cartridge rounds and finished projectiles
Merchandise: Tungsten cores
Factories: Red Lion, PA; Wharton, NJ
Statement signed: February 15, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, October 2, 1984

(R) Company: General Electric Company
Articles: Transformers; concrete reactors; regulators; precipitators; rectifiers; bushings; arresters
Merchandise: Cable; paper; steel plate; steel sheet; steel sheet (electrical); porcelain insulators
Factories: Pittsfield, MA; Schenectady, NY; Rome, GA
Statement signed: March 26, 1984
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations; New York, October 4, 1984
Revokes: T.D. 82–2–G, to cover addition of factory

(S) Company: LOU ANA FOODS, Inc.
Articles: Refined peanut oil in bulk or packages
Merchandise: Crude peanut oil, NCPA rule 176 (basis prime crude peanut oil)
Factory: Opelousas, LA
Statement signed: Sepember 25, 1984
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: New Orleans, November 2, 1984

(T) Company: Nashua Corporation
Articles: Nashua Thermaprint TM (Thermal Paper)
Merchandise: 3.3-bis-(p-dimethylaminophenyl)-6-dimethylaminophthalide, (Crystal Violet Lactone (CVL), (D-462) Dye); 6′-(cyclohexyl Methyl Amino)-3′-Methyl-2′ (Phenylamino)-Spiro (Isobenzo-Fluoran-1-(3H), 9′-(9H Xanthene)-3-One (C-1261 (Isobenzo-Fluoran-1-(3H), 9′-(9H Xanthene)-3-One (C-1261 (PSD-150) Dye); 3′-Methyl-

2'-(Phenylamino)-6'-(1-Pyrrolidinyl)-Spiro (Iso Benzofuran-1 (3H), 9'-(9H) Xanthene)-3-One(C-1259 Dye); Benzyl 4-Hydroxy Benzoate (Benzyl Paraben)
Factory: Merrimack, NH
Statement signed: September 10, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Boston, September 26, 1984
Revokes: T.D. 82-120-T

(U) Company: New Bedford Thread Co., Inc.
Articles: All cotton sewing thread
Merchandise: 70/2 combed cotton yarn
Factory: Fairhaven, MA
Statement signed: August 29, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston, October 12, 1984

(V) Company: Rhone-Poulenc Inc.
Articles: Methyl 5-(2,4-dichlorophenoxy)-2-nitrobenzoate
Merchandise: 2,4-dichlorophenol
Factory: Mt. Pleasant, TN
Statement signed: July 26, 1984
Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: New York, September 26, 1984

(W) Company: Umetco Minerals Corporation
Articles: Modified Vanadium Oxide (M.V.O.)
Merchandise: Ammonium Metavanadate
Factories: Hot Springs, AR; Rifle, CO
Statement signed: August 20, 1984
Basis of claim: Used in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, September 17, 1984
Revokes: T.D. 69-55-J, to cover successorship from Union Carbide Corporation

(X) Company: Union Carbide Corporation
Articles: Polycrystalline Silicon, Semiconductor Grade in rods or chunks
Merchandise: Polysilicon Metal Filaments 170cm x 0.7 cm
Factories: Moses Lake and Washougal, WA
Statement signed: September 5, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, September 26, 1984

(Y) Company: Union Carbide Corporation
Articles: Ethylene glycols, fiber grade; diethylene glycol
Merchandise: Ethylene glycols
Factories: Port Lavaca, TX; Alsip, IL; Torrance, CA; Hahnville, LA; Freehold, NJ
Statement signed: August 20, 1984
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, September 17, 1984
Revokes: T.D. 84-154-Y, to cover addition of 2 factories

(Z) Company: Union Carbide Grafito, Inc.
Articles: "UCAR" Graphite Electrodes
Merchandise: Calcined petroleum coke and green carbon electrodes
Factory: Yabucoa, PR
Statement signed: July 20, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, October 2, 1984

(T.D. 85-2)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued June 21, 1984, to November 13, 1984, inclusive, pursuant to sections 22.1 through 22.5, inclusive, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(d), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was forwarded or issued.

(DRA-1-09)

Dated: December 24, 1984.

File: 217586.

EDWARD B. GABLE, JR.,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Mutual Flavor Corporation
Articles: Orange extract, BATF Formula 115; lemon flavor, BATF Formula 116; passion fruit flavor, BATF Formula 121

Merchandise: 190 proof domestic ethyl alcohol
Factory: Los Angeles, CA
Statement signed: May 8, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Los Angeles, August 23, 1984

(B) Company: The Seven-Up Company
Articles: Lemon-Lime No. 3297
Merchandise: 190 proof domestic tax-paid alcohol
Factory: St. Louis, MO
Statement signed: May 31, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, June 21, 1984
Revokes: T.D. 712-291-D (an amendment to T.D. 50563-C)

(C) Company: The Seven-Up Company
Articles: Lemon-Lime No. 3260/3261
Merchandise: 190 proof domestic tax-paid alcohol
Factory: St. Louis, MO
Statement signed: May 16, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, June 21, 1984
Revokes: T.D. 81-77-D

(D) Company: The Seven-Up Company
Articles: Lemon-Lime No. 3015
Merchandise: 190 proof domestic tax-paid alcohol
Factory: St. Louis, MO
Statement signed: May 15, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, June 22, 1984
Revokes: T.D. 84-81-H

(E) Company: The Seven-Up Company
Articles: Lemon-Lime No. 3030
Merchandise: 190 proof domestic tax-paid alcohol
Factory: St. Louis, MO
Statement signed: May 15, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, June 22, 1984
Revokes: T.D. 81-77-E

(F) Company: Stepan Company
Articles: Merchandise No. 5 (aka flavoring extract No. 5)

Merchandise: Domestic tax-paid alcohol
Factory: Maywood, NJ
Statement signed: September 4, 1984
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, November 13, 1984
Revokes: T.D. 56417–D

ERRATUM

In CUSTOMS BULLETIN, Volume 18, No. 32, dated August 8, 1984, page 13, T.D. 84–155–M, the T.D. revoked was incorrect. The correct revocation is T.D. 80–62–R.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 84–134)

HERAEUS-AMERSIL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-1-00100

Before: CARMAN, *Judge.*

Memorandum Opinion and Order on Plaintiff's Motion To Strike and Defendant's Cross-Motion To Dismiss in Part

[Plaintiff's motion to strike denied; defendant's cross-motion to dismiss in part denied.]

(Decided December 13, 1984)

Fitch, King & Caffentzis (*Richard C. King* on the motion) for the plaintiff.
Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*John J. Mahon* on the cross-motion) for the defendant.

CARMAN, *Judge:* Plaintiff moves pursuant to Rules 8(c) and 12(f) of the Rules of the United States Court of International Trade [1] for an order striking certain denials from the defendant's answer. Defendant opposes the motion and cross-moves to dismiss in part for failure to state a claim upon which relief can be granted pursuant to rule 12(b)(5).

The underlying dispute pertains to the proper classification of certain imported merchandise known as "fused quartz" or "fused silica." The United States Customs Service (Customs) classified the merchandise under item 540.67 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68–9.[2] Plaintiff claims

[1] Rule 8(c) of the Rules of this Court provides in relevant part:
Defenses—Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as true and material and shall deny only the remainder . . . .
Rule 12(f) in part reads:
Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense . . . .

[2] Item 540.67 of the TSUS, as modified, provides:

Continued

that classification is proper under items 540.11 and 540.41 of the TSUS.[3] Plaintiff, in supporting its proposed classification, claims that at the relevant times "an established and uniform practice" existed within the meaning of 19 U.S.C. § 1315(d) (1982) with respect to the classification of fused quartz and fused silica.[4] Under plaintiff's theory, Customs could not deviate from that practice until 30 days after publication of notice in the Federal Register.

Defendant denies that an established and uniform practice existed. Defendant maintains that absent a "finding" that such a practice exists by the Secretary of the Treasury, or a ruling published by Customs pursuant to 19 C.F.R. § 177.10(b) (1983),[5] no established and uniform practice can arise. Defendant therefore concludes that plaintiff's claims as to a uniform practice fail as a matter of law and must be dismissed.

As is evident from paragraph 37 of the complaint, plaintiff believes that because similar merchandise at various ports has been uniformly classified under items 540.11 and 540.41 since 1963, that this practice constitutes an "established and uniform practice" within section 1315(d).

Defendant's answer at paragraph 40 offers a simple "Denied" in response to the established and uniform practice claim and further avers that no section 1315(d) "finding" has ever been made. Plaintiff moves to strike this denial, as well as the similar denial in paragraph 42 of the answer, on the ground that the responses constitute defenses that are insufficient as a matter of law.

In response, defendant claims simply that the responses in paragraphs 40 and 42 are sufficient as a matter of law. Defendant also

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Optical glass in any form, including blanks for spectacle lenses and for other optical elements; non-optical-glass blanks for corrective spectacle lenses; synthetic optical crystals in the form of ingots, segments of ingots, sheets, or blanks for optical elements; all the foregoing not optically worked; polarizing material, in plates or sheets, not cut to shape or mounted for use as polarizing optical elements;

* * * * * * *

Other optical glass and synthetic optical crystals; polarizing material ..... 25% ad val.

[3] Item 540.11, TSUS, as modified, provides:

Glass, in the mass; glass, crushed, powdered, or flaked (frostings); and waste or scrap glass; all the foregoing except glass provided for in items 540.21 and 540.27:
Glass in the mass:
Containing over 95 percent silica by weight ..... 7.5% ad val.

Item 540.41, TSUS, as modified, provides:

Glass rods, tubes, and tubing, all the foregoing not processed:
Containing over 95 percent silica by weight ..... 7% ad val.

[4] 19 U.S.C. § 1315(d) (1982) provides:

No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling; but this provision shall not apply with respect to the imposition of antidumping duties, or the imposition of countervailing duties under section 1303 of this title.

[5] 19 CFR § 177.10(b) (1983) provides:

Rulings regarding a rate of duty or charge. Any ruling regarding a rate of duty or charge which is published in the Customs Bulletin will establish a uniform practice. A published ruling may result in a change of practice, it may limit the application of a court decision, it may otherwise modify an earlier ruling with respect to the classification or valuation of an article or any other action found to be in error or no longer in accordance with the current views of the Customs Service, or it may revoke a previously-published ruling or a previously issued ruling letter. No ruling published under the provisions of this section will have the effect of changing either an earlier published ruling or a practice established by other means by imposing a higher rate of duty or charge on an article unless the earlier ruling or practice has been determined to be clearly wrong.

cross-moves to dismiss that part of the complaint relating to an established and uniform practice, paragraphs 35 through 42.

The Court first addresses defendant's motion to dismiss in part because resolution of this issue impacts largely upon plaintiff's motion to strike.

I. An Established and Uniform Practice

Underlying defendant's motion to dismiss in part is the assumption that "an established and uniform practice" under section 1315(d) can only arise from a formal "finding" by the Secretary or by a "ruling" published pursuant to 19 C.F.R. § 177.10(b) (1983). Plaintiff, on the other hand, asserts that such a practice can be established by actual liquidations over a period of time at many ports.

Subsection (d) of section 1315 was added to the Tariff Act of 1930 by the Customs Administrative Act of 1938, ch. 679, § 6, 52 Stat. 1077, 1081 (codified as amended at 19 U.S.C. § 1315(d) (1982)). Legislative history pertaining to the 1938 Act is sparse, but reveals Congress' desire "to facilitate efficient administration of the customs laws." S. Rep. No. 1465, 75th Cong., 3d Sess. 6 (1938). The proposed enactment was termed neither "an importers' bill nor . . . a domestic manufacturers' bill." *Id.* Nevertheless, it would appear that Congress, in subsection (d), by codifying a then-existing adminstrative practice, was attempting to lend certainty to the importing process. The importing community is thus aided by the provision's remonstrance that an established and uniform practice not be changed absent public notice. *See Customs Administrative Bill: Hearings on H.R. 6738 Before the House Comm. on Ways and Means,* 75th Cong., 1st Sess. 132 (1937) (analysis submitted by Treasury Department).

Earlier cases suggest that a section 1315(d) "established and uniform practice" can be predicated on uniform classifications and liquidations at various ports over a period of time. *See, e.g., Asiatic Petroleum Corp.* v. *United States,* 59 CCPA 20, 23, 449 F.2d 1309, 1312 (1971) (adopting *Asiatic Petroleum Corp.* v. *United States,* 64 Cust. Ct. 47, 58, 309 F. Supp. 1006, 1009 (1970) (Richardson, J., dissenting)); *Biddle Sawyer Corp.* v. *United States,* 50 CCPA 85, 92, 320 F.2d 416, 422 (1963); *B.R. Anderson & Co.* v. *United States,* 47 Cust. Ct. 215, 226-28, 201 F. Supp. 319, 327-28 (1961). In *Biddle Sawyer,* the Court of Customs and Patent Appeals expressly considered the issue of whether uniform classification of a certain chemical, in fact, existed. The court concluded:

> We find nothing in the testimony or in the exhibits which supports appellant's contention that there was an established and uniform practice of classifying merchandise of the quality of the imported [merchandise] under paragraph 5. Therefore it was not necessary that a notice be published pursuant to sections 315(d) or 16.10(a).

Biddle Sawyer, 50 CCPA at 92, 320 F.2d at 422. In fact, many cases have passed on the question of whether an actual uniform practice existed at the relevant times.[6] One must therefore conclude that the issue was meaningful to the determination. Otherwise, it would seem that the courts were engaging in useless formulations.

In addition, a predecessor regulation to 19 C.F.R. § 177.10(b), provided that "[i]f there is an established and uniform practice *at the various ports,*" no higher duty rate could be assessed without public notice. Customs Regulations of 1943, § 16.10(a) (emphasis added); *see B.R. Anderson & Co.* v. *United States,* 47 Cust. Ct. at 227, 201 F. Supp. at 327 ("[i]t is clear that this regulation was issued pursuant to section 315(d) of the Tariff Act of 1930"). Thus, it was Customs' understanding, originally at least, that section 1315(d) envisioned an "actual" established and uniform practice.

Further, the hearings before the House Ways and Means Committee reflect a general understanding of section 1315(d) in accord with that outlined above.

> We recognize that this section is legislation to legalize that which has been the practice of the Department for a number of years, namely, where there has existed a uniform practice, sanctioned by the customs authorities for a number of years, before a change of rate or classification is made by the Department, the Department will allow before placing the same in effect 30 days' notice after publication of such change. While we recognize the existence of this practice, it has been carried on, we may say, as a matter of executive leniency, but there has been no sanction of law.

Hearings, supra, at 212–13 (statement of American Tariff League).

Defendant's opposition to the motion of an actual established and uniform practice stems from its blurring of cases where the existence of a section 1315(d) finding was in issue.[7] To be sure, when the Secretary makes a finding that an established and uniform practice either exists or does not exist, that determination is within the Secretary's congressionally designated discretion. *See Washington Handle Co.* v. *United States,* 34 CCPA 80, 86 (1946). Such a determination cannot be disturbed by a court, except, perhaps, for an abuse of that discretion. *See Rank Precision Industries, Inc.* v. *United States,* 68 CCPA 78, 84, 660 F.2d 476, 480 (1981). In the absence of an affirmative or negative finding, however, the Court, when properly presented with the issue, may resolve it. In this connection, I well heed Chief Judge Markey's stern admonition in the

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[6] Section 1315(d) was designed to promote uniformity in classification matters. It does not apply to other customs determinations, such as appraisement. *Peugeot Motors of America, Inc.* v. *United States,* 8 CIT ——, Slip Op. 84–103, at 7–8 (Sept. 13, 1984).

[7] There is no strict formula for issuing a "finding" under section 1315(d). Such a finding can take many forms, and, indeed, the cases reflect this. *See Rank Precision Indus., Inc.* v. *United States,* 68 CCPA 78, 660 F.2d 476 (1981) (letter from Division Director); *Ditbro Pearl Co.* v. *United States,* 62 CCPA 95, 515 F.2d 1157 (1975) (abstracted Treasury Decision); *Asiatic Petroleum Corp.* v. *United States,* 59 CCPA 20, 449 F.2d 1309 (1971) (letter from Acting Commissioner of Customs). The proper test for a section 1315(d) finding is merely whether a clear impression is given through appropriate language that such a finding is being made. *Asiatic Petroleum,* 59 CCPA at 23, 449 F.2d at 1312; 64 Cust. Ct. at 59, 309 F. Supp. at 1014 (Richardson, J., dissenting).

Ditbro Pearl case that to hold otherwise "would render § 315(d) a nullity in the hands of a Secretary choosing to refrain from ever making a finding." *Ditbro Pearl Co.* v. *United States,* 62 CCPA 95, 97, 515 F.2d 1157, 1159 (Markey, C.J., concurring).[8]

Defendant objects to the Court making such determinations, contending that "there is no law to apply." "There are no criteria by which to gauge how long a practice must exist or how uniform it must be." Defendant's Memorandum In Opposition, at 24. This view is obviously unfounded since courts have long considered such issues both under section 1315(d), *Biddle Sawyer Corp.* v. *United States,* 50 CCPA 85, 92, 320 F.2d 416, 422 (1963), and under the interpretive principle that a "long-established administrative practice," if found to exist, will bear upon an interpretation of tariff laws, *Commonwealth Oil Refining Co.* v. *United States,* 60 CCPA 162, 174, 480 F.2d 1352, 1361 (1973). Indeed, courts have long been guided in this area by inquiring whether the practice was "known, long continued, uniform and general." *Rapken & Co., Ltd.* v. *United States,* 25 CCPA 268, 274 (1938).

In accordance with the above, defendant's motion to dismiss that part of the complaint relating to an established and uniform practice must be denied, since although no finding or published ruling is alleged, plaintiff may show an established and uniform practice under section 1315(d) by actual uniform liquidations at the various ports over a period of time.

II. Motion To Strike Certain Defenses

Having determined that plaintiff may be allowed to demonstrate whether an actual section 1315(d) practice existed during the relevant times, the Court now turns to plaintiff's motion to strike certain denials contained in the defendant's answer.

Plaintiffs' motion relates to the following:

Complaint

> 37. "Optical quality fused silica" on or after August 31, 1963, and until liquidation of the entries in issue herein, was uniformly classified by various District Directors or Area Directors of Customs as "glass in the mass: Containing over 95 percent silica by weight" under item 540.11, TSUS, or as "Glass rods, * * *, all the foregoing not processed; Containing over 95 percent silica by weight" under item 540.41, TSUS depending upon its form as imported.
>
> * * * * * * *

[8] Recently, in *Siemens America, Inc.* v. *United States,* 692 F.2d 1382 (Fed. Cir. 1982), the Federal Circuit (formerly the Court of Customs and Patent Appeals) indicated that a formal "finding" is not a precondition to application of section 1315(d). *See Id.* at 1384. The court assumed for argument's sake that a finding was not necessary and then considered plaintiff's offer of proof on the question. Because proof on the issue of an established and uniform practice was found wanting, the court held against the importer.

The case strongly suggests that an actual practice is cognizable under section 1315(d). By considering the sufficiency of the evidence on the point, the Federal Circuit implied that with adequate proof, such a practice can be found, in fact, to exist.

40. The uniform classification as described in 37, above, constitutes an actual established and uniform practice.

* * * * * * *

42. Liquidation under item 540.67, TSUS, as amended, is improper where an actual established and uniform practice existed at the time of liquidation, and no notice pursuant to § 315(d) has been published.

ANSWER

40. Denied. Further, defendant avers that the Secretary of the Treasury or his delegate have never made a finding pursuant to 19 U.S.C. § 1315(d) that an established and uniform practice existed regarding the tariff classification of the merchandise in issue.

* * * * * * *

42. Denied.

Plaintiff contends that the defendant, by simply denying the allegation of an established and uniform practice, severely hampers discovery efforts and motion practice. Plaintiff urges that the "defense" in paragraph 40, if it be one, must consist of more than a simple denial.[9]

The Court is therefore called upon to weigh the legal sufficiency of the denials contained in paragraphs 40 and 42 of defendant's answer.

Rule 8(c) of the Rules of this Court provides in part that "[a] party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." The rule, patterned after Rule 8(b) of the Federal Rules of Civil Procedure, is designed to apprise a plaintiff of the defenses with which he will have to contend at trial. Lawyers Cooperative Publishing Co., *Federal Procedure* § 62.56, at 230 (J. Goger man. ed. 1984); *see White* v. *Smith*, 91 F.R.D. 607, 608 (W.D.N.Y. 1981). Motions directed to the sufficiency of denials and defenses, such as motions to strike or for a more definite statement, are highly disfavored. *Krauss* v. *Keibler-Thompson Corp.*, 72 F.R.D. 615, 618 (D. Del. 1976). Courts traditionally have allowed such motions only where under no circumstances could the defense prevail, *Green Mountain Power Corp.* v. *General Electric Corp.*, 496 F. Supp. 169, 171 (D. Vt. 1980), where the defense is clearly "insufficient as a matter of law," *Anchor Hocking Corp.* v. *Jacksonville Electric Corp.*, 419 F. Supp. 992, 1000 (M.D. Fla. 1976), or where the defense "bear[s] no possible relation to the claim asserted," *Blenke Brothers Motors, Inc.* v. *Chrysler Corp.*, 189 F. Supp. 420, 422 (N.D. Ill. 1960).

[9]The second sentence of paragraph 40 of defendant's answer is largely superfluous since the court has determined that a formal "finding" by the Secretary is not a prerequisite to the operation of 19 U.S.C. § 1315(d).

Given the stringency of the standard for striking defenses on insufficiency grounds, plaintiff's motion must be denied. Paragraph 40 of the complaint, operative here, states that the events described in paragraph 37 constitute an established and uniform practice. Defendant's answer, in relevant part (*see supra* note 9) simply states, "Denied." In *Berkey Technical Corp.* v. *United States*, 71 Cust. Ct. 275, 380 F. Supp. 786 (1973), the court was confronted with a similar question. In that case, plaintiff's complaint read: "Said articles are not illuminating." Defendant's answer was simply: "Denied." There, Judge (now Chief Judge) Re held that the answer was sufficient as a matter of law, noting that while "a more elaborate answer could have been drafted . . ., the denial was neither equivocal nor ambiguous." *Id.* at 276, 380 F. Supp. at 788.

By the same token here, the complaint asserts that certain acts on the part of Customs constituted an established and uniform practice under 19 U.S.C. § 1315(d). The effect of defendant's denial is to state that those acts do not constitute such a practice. The "denied" is a "clear and positive response that categorically denie[s] plaintiff's allegation." *Berkey Technical Corp.*, 71 Cust Ct. at 276, 380 F. Supp. at 788. Defendant's answer at paragraph 40 operates either to deny that the facts alleged constitute an established and uniform practice or that the facts themselves, as alleged, are disputed.

Plaintiff's entreaties to the effect that it cannot fashion appropriate motion practice or discovery must be rejected. The issue has been framed adequately by the pleadings. It now devolves on plaintiff, through appropriate discovery, to substantiate the claim asserted in paragraphs 35 through 42 of the complaint.

Plaintiff's motion to strike certain defenses contained in defendant's answer is denied; defendant's cross-motion to dismiss in part is also denied.

Order accordingly.

(Slip Op. 84-135)

THE UNITED STATES, PLAINTIFF *v.* GOLD MOUNTAIN COFFEE, LTD., ET AL., DEFENDANTS

Court No. 84-6-00858

Before: RESTANI, *Judge.*

Opinion and Order

[Plaintiff's motion for rehearing denied.]

(Decided December 17, 1984)

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, *Kevin C. Kennedy*, Civil Division, United States Department of Justice, for plaintiff.

Barnes, Richardson & Colburn (Andrew P. Vance, Michael A. Johnson, John J. Galvin and *Carl J. Laurino, Jr.),* and *Kaplan, Russin, Vecchi, Eytan & Collins (Mattaniah Eytan)* for defendants.

RESTANI, *Judge:* This matter is before the court on plaintiff's motion, pursuant to 28 U.S.C. § 2646 (1982) and Rule 59 of the Rules of this Court, for rehearing of this court's opinion and order in this action. 8 CIT ——, Slip Op. 84–117 (October 16, 1984). That opinion and order granted defendants' motion to quash plaintiff's amended warrant for arrest of certain coffee beans.

Now, in its motion for rehearing, plaintiff argues that: (1) plaintiff's arrest warrant was proper because it was intended to vest *in rem* jurisdiction in this court; (2) 19 U.S.C. § 1592(c)(5) (1982) [1] contemplates forfeiture in addition to penalties where prohibited merchandise is involved; and (3) coffee beans are prohibited merchandise. Plaintiff does not seek rehearing of the court's decision declining jurisdiction over planitiff's claim under 18 U.S.C. § 545 (1982). For the following reasons, plaintiff's motion for rehearing is denied in all respects.

A motion for rehearing is addressed to the sound discretion of the court. *Nahrgang Co.* v. *United States,* 6 CIT ——, Slip Op. 83–108 at 2 (1983), *citing Commonwealth Oil Refining Co.* v. *United States,* 60 CCPA 162, 166, 480 F.2d 1352, 1355 (1973). In general, "a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding." *Nahrgang* at 3, *citing W.J. Byrnes & Co.* v. *United States,* 68 Cust. Ct. 358 (1972). A rehearing may be proper when there was: (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case. *Id.* In any event, in ruling on a petition for rehearing, a court's previous decision will not be disturbed unless it is "manifestly erroneous." *Quigley & Manard, Inc.* v. *United States,* 61 CCPA 65, 496 F.2d 1214 (1974). Furthermore, "arguments raised for the first time on rehearing are not properly before the court for consideration when prior opportunity existed during trial for the moving party to have adequately made its position known." *Wild Heerbrugg Instruments Co.* v. *United States,* 81 Cust. Ct. 141 (1978).

First, plaintiff argues that an arrest warrant is necessary to invest this court with *in rem* jurisdiction over the coffee beans at issue. Arrest, however, is not necessary to *in rem* jurisdiction if plaintiff has control of the goods. *See Dodge* v. *United States,* 272 U.S. 530, 532 (1926). *See also United States* v. *One 1977 Mercedes Benz,* 708 F.2d 444, 450 (9th Cir. 1983), *cert. denied,* —— U.S. ——, 104 S. Ct. 981 (1984); *Interbartolo* v. *United States,* 303 F.2d 34, 38–

[1] 19 U.S.C. § 1592(c)(5) (1982) provides:

39 (1st Cir. 1962); Fraser, *Actions In Rem*, 34 CORNELL L. Q. 29, 38 (1948). Even if *in rem* relief is appropriate, which the court found not to be the case here, there is simply no necessity for the arrest of the beans in order for this court to render an enforceable judgment of forfeiture.[2]

Second, plaintiff argues, as it did in its previous briefs, that § 1592(c)(5) provides for forfeiture in addition to monetary penalties where prohibited merchandise is involved. Plaintiff's interpretation of that section is that prohibited goods should be forfeited under § 1592 regardless of the penalty assessed. The basis of this argument is that the statute provides that prohibited goods, when properly seized, need not be returned by the Secretary upon the deposit of security for any penalties which may be assessed. 19 U.S.C. § 1592(c)(5).

Plaintiff here seeks to sustain a court imposed arrest of property although seizure by the Secretary of the Treasury ("Secretary") is authorized only upon a specific statutory basis. For the court to uphold the arrest of the goods on plaintiff's unsupported request, would be to ignore the statutory scheme provided for under § 1592. Neither party has made a showing to the court as to what determinations the Secretary made pursuant to § 1592 regarding these coffee beans. As long as the government maintains control of the beans pursuant to the voluntary constructive seizure agreement, it is unlikely that the Secretary will be able to involuntarily seize these coffee beans under § 1592. Furthermore, plaintiff has made no showing that the voluntary constructive seizure agreement constitutes the "seizure" contemplated by § 1592. In addition, it is most likely that Congress under § 1592 did not require the return of prohibited goods because almost all such goods are subject to forfeiture under other statutes.[3] As stated previously, § 1592(c)(5) applies largely to interim remedies. It is not the source of another basis for forfeiture. Again, this court rejects plaintiff's interpretation of § 1592 for the reasons stated above and in the court's previous opinion and order.

Lastly, although plaintiff asserts that the coffee beans are "prohibited merchandise", it has pointed to no statute defining that term in such a way that would cause one to conclude that these coffee beans are included in the term. Coffee beans are the type of goods that in some situations may be imported and are not the type of goods which must necessarily be forfeited to protect the public or for some other evident reason. In addition, plaintiff's argument would make the term "restricted merchandise" superfluous. An interpretation of a statute that causes any part of it to be meaningless is strongly disfavored, "every effort [must be] made to

[2] Under § 1592, forfeiture (the *in rem* relief under discussion) will ordinarily not be permitted unless the monetary penalty imposed is not paid. 19 U.S.C. § 1592(c)(5). Thus, all prerequisites to forfeiture have not yet occurred.

[3] *See, e.g.* 19 U.S.C. § 1305 (immoral articles).

give full force and effect to all the language contained therein." *Dart Export Corp.* v. *United States*, 43 CCPA 64, 74 (1956), *cert. denied*, 353 U.S. 824 (1956). In short, plaintiff has made no new argument which might convince the court that the beans are other than "restricted" goods, as the court concluded in its previous opinion.

In summary, the government's brief advances no argument that the court did not consider in its first decision. *Cf. Jarvis Clark Co.* v. *United States*, 739 F.2d 628 (Fed. Cir. 1984) (denying petition for rehearing). Moreover, the court's earlier decision is neither "significantly flawed" nor "manifestly erroneous." Consequently, plaintiff has presented no acceptable grounds for rehearing.

Accordingly, plaintiff's motion for rehearing is denied and the court's previous decision to quash plaintiff's amended warrant for the arrest of the coffee beans remains.

(Slip Op. 84-136)

THE UNITED STATES, PLAINTIFF *v.* GOLD MOUNTAIN COFFEE, LTD., ET AL., DEFENDANTS

Court No. 84-6-00858

Before: RESTANI, *Judge.*

Opinion and Order

[Plaintiff's motion for partial summary judgment dismissing counterclaims is denied.]

(Decided December 19, 1984)

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, *Kevin C. Kennedy*, Civil Division, United States Department of Justice, for plaintiff.

Barnes, Richardson & Colburn (*Andrew P. Vance, Michael A. Johnson, John J. Galvin* and *Carl J. Laurino, Jr.*), and *Kaplan, Russin, Vecchi, Eytan & Collins* (*Mattaniah Eytan*), for defendants.

RESTANI, *Judge:* Plaintiff, the United States of America, brings this action for penalties and forfeitures [1] alleging that defendants Gold Mountain Coffee, Ltd., Gold Mountain Holdings, Ltd., and Teck Hock and Company, Ltd. made false statements in connection with the importation of coffee beans labeled as originating in the Peoples' Republic of China. Defendants counterclaim, *inter alia*, for damages alleging improper detention and seizure of the coffee beans. Plaintiff seeks partial summary judgment dismissing the counterclaims based on lack of jurisdiction and the doctrine of sov-

[1] The court previously ruled in this case that it has no jurisdiction over forfeiture actions under 18 U.S.C. § 545 (1982) and that the right to judicially ordered forfeiture under 19 U.S.C. § 1592 (1982) is limited. 8 CIT ——, Slip Op. 84-117 (October 16, 1984).

ereign immunity.[2] Plaintiff also opposes defendants' motions to amend their counterclaims. Defendant Teck Hock & Co., Ltd. clearly states in its motion to amend counterclaim that it seeks only recoupment in its counterclaim for damages. The Gold Mountain defendants do not so clarify their counterclaim and they seek to amend it to allege violations of contractual and constitutional rights.

Although 28 U.S.C. § 1583 may provide a basis of jurisdiction over the claims at issue, the right of counterclaim under § 1583 does not provide a waiver of sovereign immunity beyond that allowed by other law. Court of International Trade ("CIT") Rule 13(c). Defendants' mere allegations of unconstitutional taking of property, tortious conduct or breach of implied contract are not adequate assertions of authority for this court to render judgments which would be satisfied from the Treasury of the United States.[3] It is possible that these types of claims may be brought in the Claims Court,[4] the district court,[5] or this court. Defendants, however, have not pointed to a statutory waiver of sovereign immunity for suit in this or any other federal court which would permit a monetary judgment in defendants' favor. Nor have defendants demonstrated a jurisdictional basis for suit in another court. Without such showings, action by this court on defendants' affirmative claims or transfer of the claims to another court is inappropriate. Therefore, the court will consider defendants' monetary counterclaims as claims for recoupment only.

Recoupment is in the nature of a defense. It requires no waiver of sovereign immunity because the government necessarily consents to adjudication of the entire transaction when it files suit with regard to that transaction. *Frederick* v. *United States,* 386 F.2d 481 489 (5th Cir. 1967). *See also* 3 J. Moore, MOORE'S FEDERAL PRACTICE ¶ 13.28, (2d ed. 1984). Recoupment implies a balancing of credits. Therefore both plaintiff's and defendants' claims must give rise to the same type of relief. *Frederick* v. *United States* at 488; *United States* v. *Ameco Electronic Corp.,* 224 F.Supp. 783, 786 (E.D.N.Y. 1963). Insofar as plaintiff's claim here involves forfeiture of goods, recoupment is not permitted.[6] Insofar as plaintiff seeks a money judgment, a claim in recoupment reducing the amount of such judgment is possible.

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[2] Plaintiff does not seek dismissal of defendants' counterclaims for entry or release of property. Jurisdiction exists under 28 U.S.C. § 1583 (1982) to hear such claims, and these nonmonetary claims are not barred by the doctrine of sovereign immunity. *See Newsom* v. *Vanderbilt University,* 653 F.2d 1100, 1107 (6th Cir. 1981).

[3] Defendant Teck Hock and the plaintiff seem to be in agreement that there is no waiver of sovereign immunity in any court for an affirmative tort claim against the United States arising from detention of seizure of goods by customs officials. *See* 28 U.S.C. § 2680(c) (1982); *Kosak* v. *United States,* 104 S.Ct. 1519, 1523–26 (1984); *Siaca* v. *United States,* 7 CIT ——, Slip Op. 84–5 at 3–6 (January 26, 1984).

[4] *See United States* v. *Federal Insurance Co.,* 7 CIT ——, Slip Op. 83–118 (Nov. 15, 1983),

[5] *See Bar Bea Truck Leasing Co.* v. *United States,* 4 CIT 70, 80, 546 F. Supp. 558, 566 (1982), *rev'd on other grounds,* 713 F.2d 1563 (Fed. Cir. 1983).

[6] It is this proposition for which *United States* v. *2116 Boxes of Bond Beef,* 726 F.2d 1481 (10th Cir.), *cert. denied sub nom, Jarboe-Lackey Feedlots, Inc.* v. *United States,* 105 S.Ct. 105 (1984) and *United States* v. *Lockheed L–118 Aircraft,* 656 F.2d 390 (9th Cir. 1979) (cited by plaintiff) may be said to stand, and not for the broader proposition that recoupment requires a specific statutory waiver of sovereign immunity.

Still, recoupment requires that plaintiff's and defendants' claims involve the same transaction. Plaintiff argues that its claim turns on defendants' conduct in the importation of the coffee beans, whereas defendants' claims involve the detention and seizure of the beans. Because all claims involve the same coffee beans and the detention and seizure resulted directly from the importation of the beans, all claims fall within a broad definition of claims arising from the same transaction. Plaintiff might argue that the definition of "same transaction" should be narrowed where a sovereign function such as customs penalty collection is involved. Although the sovereign versus proprietary distinction may be important on occasion, the court recognizes that it is often anything but "distinct." For example, even though *Frederick* involved loan collection rather than a tax or customs dispute, the loans in *Frederick* were made to further public policy interests and were not for purely commercial purposes. As will be demonstrated, the court finds that the presence of admittedly sovereign functions in this case does not warrant disregard of the well-established right to recoupment.

One of the principal cases cited by plaintiff, *EEOC* v. *1st National Bank of Jackson,* 614 F.2d 1004 (5th Cir.), *cert. denied,* 450 U.S. 917 (1980), may be viewed as a case where the "same transaction" element of recoupment was lacking. In that case the court found a related malicious prosecution claim against the United States too tenuously and indirectly connected to the unlawful discrimination claim brought by the United States to qualify as a claim in recoupment. Underlying that decision, however, appears to be the court's concern that Congress clearly intended that the sovereign not be sued in an original action on account of the particular tort at issue. This concern was made more evident in *United States* v. *Carson,* 360 F.Supp. 842 (S.D. Tex. 1973) where the court first cites *Frederick* as permitting recoupment absent a statutory waiver of sovereign immunity, but denies recoupment on the basis of the lack of such a waiver in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* (1982). The question posed by the FTCA did not plague the *Frederick* court because it was able to find a contractual duty which the United States owed the defendant. That duty arose from the very same contract on which the United States sued. This court, however, is troubled by the clearly expressed policy of the FTCA that the United States not be subject to tort damages when its customs officials detain goods. *See* footnote 3 *supra.* Nonetheless, this court rejects the notion found in *United States* v. *Carson,* 360 F.Supp. 843 (S.D. Tex. 1973), that the FTCA is something other than a statute waiving sovereign immunity.

It is the very lack of necessity of a statutory waiver of sovereign immunity which distinguishes counterclaims for recoupment from counterclaims seeking more far-reaching relief. The case of *Bull* v. *United States,* 295 U.S. 247 (1934) (involving tax collection), makes clear that even when the United States is acting in its sovereign

capacity, it must seek equity in order to recover a money judgment.[7] If one accepts the principle stated in *Bull*—that recoupment is a matter of equity—the ordinary sovereign immunity protections simply do not apply in a case of recoupment. Because this is a matter of equity, it is irrelevant whether the recoupment claim sounds in tort and may not be heard as an original claim in any court, or whether it is some other type of claim which may be cognizable as an original claim in some court. Therefore, the lack of a waiver of sovereign immunity in the FTCA for this claim does not bar recoupment.

To avoid penalizing defendants beyond the penalties set forth in 19 U.S.C. § 1592, the court must determine whether defendants were legally injured by the detention and seizure. A fair and equitable judgment cannot be rendered without doing so. Since plaintiff must prevail on its related claim in order for the right of recoupment to arise, it will be difficult for defendants to recoup any damages. Nonetheless, the court is unprepared at this early stage to state that there is no scenario under which defendants will succeed in establishing their recoupment claims.

Apart from the tort theory of damages, the Gold Mountain defendants have raised claims based on an implied contract of bailment and an unconstitutional taking of property. Plaintiff has challenged these counterclaims on the grounds of lack of jurisdiction and sovereign immunity (failure to state a claim). The merits have not been addressed.[8] As indicated, the right of recoupment applies to all types of claims. Thus, in this case a recoupment claim sounding in contract or based on the Constitution will not be barred on the basis of lack of jurisdiction or the absence of a statutory waiver of sovereign immunity.

Since the Gold Mountain defendants have not prayed for relief under their constitutional and contractual counterclaims, the court will not permit their motion to amend to add the counterclaims in their present form.[9] Therefore, the Gold Mountain defendants are directed to file their recoupment counterclaim in a proper form within ten days of this date, if they wish the court to hear such a claim.

Accordingly, plaintiff's motion for partial summary judgment is denied, defendant Teck Hock's motion to amend its counterclaim is granted, and the Gold Mountain defendant's motion to amend their counterclaim is denied, but permission is granted to file a counterclaim in the form indicated by the court.

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[7] The Court of International Trade has sufficient equitable jurisdiction to hear the recoupment claim. 28 U.S.C. § 1585. No separate jurisdictional provision is required.

[8] Plaintiff does assert that defendants' implied contract claim cannot succeed because an express contract exists. This issue was addressed only in passing.

[9] In addition, a new answer and integrated counterclaim should have been lodged with the court, not the piecemeal amendment provided.

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The following abstracts of decisions of the Unit
published for the information and guidance of offic
decisions are not of sufficient general interest to pri
to Customs officials in easily locating cases and traci

ABSTRACTED

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASS Item No
P84/369	Re, C.J. December 12, 1984	James Electronics	83-6-00899	Item 685 7.7¢ w allowa item 8

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ıternational Trade

Abstracts

DEPARTMENT OF THE TREASURY, *December 18, 1984.*

United States Court of International Trade at New York are officers of the Customs and others concerned. Although the o print in full, the summary herein given will be of assistance tracing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

CTED PROTEST DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
tem No. and rate	Item No. and rate		
tem 685.90 7.7¢ without allowance under item 807.00	Item 685.90 7.7¢ less cost or value of U.S. origin components as show on entry documents	Agreed statement of facts	New York Coils, electrical coils, etc.

ABSTRACTED P

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSES
				Item No.
P84/370	Re, C.J. December 12, 1984	Puritan-Bennett of California	83-6-00637, etc.	Item 709.1 5.6%, 5.3 5.1%
P84/371	Re, C.J. December 12, 1984	Toscany Imports Ltd.	83-7-01038	Item 546.6 60%
P84/372	Re, C.J. December 13, 1984	E. Gluck Corp.	83-5-00713	Item 688.3 Various for modu cases Item 740.3 Various for band
P84/373	Re, C.J. December 13, 1984	Leisurecraft Products Ltd.	83-3-00432	Item 688.3 Various for modu cases Item 740.3 Various for band
P84/374	Re, C.J. December 13, 1984	Leisurecraft Ltd.	83-5-00764	Item 688.3 Various for modu cases Item 740.3 Various for band

TED PROTEST DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
m No. and rate	Item No. and rate		
m 709.17 .6%, 5.3% or .1%	Item 709.45 4.4%, 4.5% or 4.7%	Agreed statement of facts	Los Angeles Monitors, recorder modules and parts thereof
m 546.60 0%	Item 546.60 30%	Agreed statement of facts	Baltimore Wine glasses 8 oz., Park Avenue
m 688.36 Various rates or modules and ases m 740.35 Various rates or bands	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% for bands an entirety with modules and cases	Agreed statement of facts	New York Electronic LCD watches, solid state digital modules, cases, and bands for solid state digital timepieces
m 688.36 Various rates or modules and ases m 740.35 Various rates or bands	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% for bands an entirety with modules and cases	Agreed statement of facts	New York Electronic LCD watches, solid state digital modules, cases, and bands for solid state digital timepieces
m 688.36 Various rates or modules and ases m 740.35 Various rates or bands	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% for bands an entirety with modules and cases	Agreed statement of facts	New York Electronic LCD watches, solid state digital modules, cases, and bands for solid state digital timepieces

P84/375	Re, C.J. December 13, 1984	Webcor Electronics Corp.	83-5-00765	Item 68 Vario for m cases Item 74 Vario for ba
P84/376	Re, C.J. December 14, 1984	Jet Sonic Corp.	82-12-01646	Item 74 16.7% Items 74 740.35 32.4%
P84/377	Re, C.J. December 14, 1984	Madison Watch Co.	82-12-01644	Merchan constr separa modul cases classif variou variou the fit (where were a constr separa
P84/378	Re, C.J. December 14, 1984	Madison Watch Co.	82-12-01649	Item 740 16.7%, Items 74 740.35 32.4%,
P84/379	Re, C.J. December 14, 1984	Madison Watch Co.	82-12-01745	Item 740 16.7%, Items 74 740.35 32.4%,
P84/380	Re, C.J. December 14, 1984	Temlex Industries	82-12-01650	Item 740 15.8% Items 74 740.35 29.8%

Item 688.36 Various rates for modules and cases Item 740.35 Various rates for bands	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% for bands an entirety with modules and cases	Agreed statement of facts	New York Electronic LCD watches, solid state digital modules, cases, and bands for solid state digital timepieces
Item 740.30 16.7%, 15.3% Items 740.34, 740.35 32.4%, 29.8%	Item 688.36 5.3% or 5.1%	U.S. v. Texas Instruments, Inc. 673 F.2d 1375 (1982)	New York Bands; entireties comprised of solid state modules and cases imported with appropriate fittings
Merchandise constructively separated into modules and cases and classified under various items at various rates; the fittings (where present) were also constructively separated	Item 688.36 5.3% or 5.1%	U.S. v. Texas Instruments, Inc. 673 F.2d 1375 (1982)	New York Solid state electronic digital watches which are entireties comprised of solid state modules and cases imported with or without appropriate fittings (including bands, chains and straps)
Item 740.30 16.7%, 15.3% Items 740.34, 740.35 32.4%, 29.8%	Item 688.36 5.3% or 5.1%	U.S. v. Texas Instruments, Inc. 673 F.2d 1375 (1982)	New York Bands; entireties comprised of solid state modules and cases imported with appropriate fittings
Item 740.30 16.7%, 15.3% Items 740.34, 740.35 32.4%, 29.8%	Item 688.36 5.3% or 5.1% 5.5%	U.S. v. Texas Instruments, Inc. 673 F.2d 1375 (1982)	New York Bands; entireties comprised of solid state modules and cases imported with appropriate fittings
Item 740.30 15.3% Items 740.34, 740.35 29.8%	Item 688.36 5.1%	U.S. v. Texas Instruments, Inc., 673 F.2d 1375 (1982)	New York Bands; entireties comprised of solid state modules and cases imported with appropriate fittings

ABSTRACTED PROTE

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSES
				Item No. a
P84/381	Re, C.J. December 14, 1984	Temlex Industries	82-12-01651	Merchandi construct separated modules cases and classified various i various r the fittin (where p were also construct separated

ROTEST DECISIONS—Continued

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
n No. and rate	Item No. and rate		
rchandise onstructively parated into odules and ses and assified under arious items at arious rates; e fittings here present) ere also onstructively parated	Item 688.86 5.3%	U.S. v. Texas Instruments, Inc. 673 F.2d 1375 (1982)	New York Solid state electronic digital watches which are entireties comprised of solid state modules and cases imported with or without appropriate fittings (including bands, chains and straps)

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ABSTRACTED REAPPRAISE

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
R84/455	Re, C.J. December 12, 1984	Twin Togs Creations, Inc.	78–4–00975, etc.	Export value	A
R84/456	Watson, J. December 12, 1984	Bruce Duncan Co.	R61/19611	Export value	A
R84/457	Watson, J. December 12, 1984	Bushnell International, Inc.	R60/9753, etc.	Export value	A
R84/458	Watson, J. December 12, 1984	E.J. & R. Gindi	R65/23557	Export value	F

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RAISEMENT DECISIONS

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Appraised unit values specified on entry papers by appraising Customs official, less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Los Angeles Transistor radios, together with their accessories and parts; entirety
	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Los Angeles Binoculars
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised	Agreed statement of facts	Los Angeles Transistor radios, together with their accessories and parts; entirety

ABSTRACTED REAPPRAISEM

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
R84/459	Watson, J. December 12, 1984	James G. Wiley Co.	R64/7585, etc.	Export value
R84/460	Watson, J. December 12, 1984	New York Merchandise Co.	R62/6028, etc.	Export value
R84/461	Watson, J. December 12, 1984	Panorama Enterprises, Inc.	R60/1952, etc.	Export value
R84/462	Watson, J. December 12, 1984	Panorama Enterprises, Inc.	R60/19559, etc.	Export value
R84/463	Watson, J. December 12, 1984	Randa, Inc.	R61/12390	Export value
R84/464	Watson, J. December 12, 1984	Randa, Inc.	R61/18423	Export value
R84/465	Watson, J. December 12, 1984	Reliance Int'l Marketing Co.	R65/19540	Export value

ISEMENT DECISIONS—Continued

OF ION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts; entirety
	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	San Diego Transistor radios together with their accessories and parts; entirety
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts; entirety
	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Los Angeles Transistor radios together with their accessories and parts; entirety
	F.o.b. unit invoice prices plus 20% of of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts; entirety
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Honolulu Transistor radios together with their accessories and parts; entirety
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Batteries

R84/466	Watson, J. December 12, 1984	Ruby Importing Co.	R60/4383, etc.
R84/467	Watson, J. December 12, 1984	Winter Wolff & Co.	R62/12064, etc.
R84/468	Watson, J. December 14, 1984	Balfour, Guthrie & Co.	R61/5702, etc.
R84/469	Watson, J. December 14, 1984	Eastern Associates	R61/20508, etc.
R84/470	Watson, J. December 14, 1984	Kaysons Import Corp.	R63/15831
R84/471	Watson, J. December 14, 1984	Safeway Stores, Inc.	R61/14618, etc.

0/4383, tc.	Export value	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Los Angeles Flatware
2/12064, tc.	Export value	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Los Angeles Pipe fittings
1/5702, tc.	Export value	F.o.b. invoice unit prices as shown on entry documents plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed	Agreed statement of facts	New York Canned tuna
1/20506, tc.	Export value	F.o.b. invoice unit prices as shown on entry documents plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts; entirety
1/15831	Export value	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Los Angeles Dinnerware
1/14618, tc.	Export value	F.o.b. invoice unit prices as shown on entry documents plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed	Agreed statement of facts	Baltimore Tuna in brine

Decision of U.S. Court of Appeals for the Federal Circuit

APPEAL 84-1040 Schott Optical Glass, Inc. *v.* The United States of America—OPTICAL LENS—Appeal from Slip Op. 84-9, filed on April 2, 1984, decided on December 11, 1984: REVERSED AND REMANDED.

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